

No. 3 100

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 23.

E. JACK SMITH, JACK CLARK, R. S. RIVERS, and W. CONNELL SMITH, partners trading under the firm name of E. JACK SMITH, CONTRACTOR, *Petitioners.*

COMER DAVIS, REESE PERRY and JOHN C. TOWNLEY, as board
of county tax assessors of FILTON COUNTY, et al., Re-
spondents.

**SUPPLEMENTAL BRIEF ON BEHALF OF
PETITIONERS.**

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v.

COMER DAVIS, REESE PERRY and JOHN C. TOWNLEY, as board of county tax assessors of FULTON COUNTY, et al., *Respondents*.

**SUPPLEMENTAL BRIEF ON BEHALF OF
PETITIONERS.**

STATEMENT.

In accordance with the order of the Court entered October 16, 1944, in this case, the petitioner herein submits this supplemental brief upon the two questions mentioned in said order.

First; if 31 U. S. C., sec. 742, applicable to the obligation here involved?

Second, if so applicable whether there is constitutional authority for the enactment.

These questions will be covered in the argument in the order in which we have stated them here.

The sole question remaining to be considered in this proceeding is whether or not the taxing authorities of the State of Georgia and the County of Fulton have authority to tax the balance due to the petitioner from the United States Government upon a contract covering the construction of an air base at Savannah, Georgia.

The petitioner in its original brief challenged the right of these authorities to tax this item because of the implied constitutional immunity from taxation which has prevailed since the decision in the case of *McCulloch v. Maryland*, 4 Wheaton, page 316. The petitioner now relies upon this line of authority as well as the exemption granted to obligations of this character under 31 U. S. C., sec. 742. This brief will be directed to the latter question as covered by the order of the Court.

ARGUMENT.

I.

Is 31 U. S. C., Sec. 742, Applicable to the Obligation Here Involved?

A determination of whether or not 31 U. S. C., sec. 742, is applicable to the obligation involved in this case would be promoted by a careful study of the history of the legislation. The first enactment of a statute of this character, which in the beginning was very simple in its language, grew out of the legislation in Congress providing for the raising of revenue to support the Union in the war between the States.

By an Act approved February 25, 1862, (Chap. 33, para. 2, 12 Stat. 346), the Congress declared:

"All stocks, bonds, and other securities of the United States held by individuals, corporations, or associa-

tions within the United States shall be exempt from taxation by or under state authority."

This statute above referred to was enacted in connection with the authorization for the issuance of Five Hundred Million Dollars in bonds to carry on the war between the States, and as a part of this Act the above language was incorporated exempting the bonds from taxation.

Later in the Act of March 3, 1863, Chap. 73, para. 1, 12 Stat. 710, the first statute was re-enacted in connection with an authorization to issue United States bonds in the amount of Three Hundred Million Dollars for that current fiscal year and Six Hundred Million Dollars for the following fiscal year, and attached thereto was a provision reading as follows:

“And all the bonds and treasury notes or United States notes issued under the provisions of this Act shall be exempt from taxation by or under state or municipal authority.”

This subject again claimed the attention of Congress in the Act of March 3, 1864, Chap. 17, para. 1, 13 Stat. 13, in an Act supplementary to the Act of March 3, 1863. This Act authorized the Secretary of the Treasury in lieu of Two Hundred Million Dollars of the authorization in said Act of March 3, 1863, and in connection therewith, from time to time to borrow on the credit of the United States that amount of money and issue bonds therefor. This Act further provided:

“And all bonds issued under this Act shall be exempt from taxation by or under state or municipal authority.”

Congress again legislated along the same line in the Act of June 30, 1864, Chap. 172, para. 1, 13 Stat. 218, authorizing the issuance of Four Hundred Million Dollars of government bonds and in connection therewith the Secretary was authorized to:

“Dispose of such bonds *** at any time, on such terms as he may deem most advisable, for lawful money of the United States, or at his discretion, for treasury notes, certificates of indebtedness, or certificates of deposit issued under any Act of Congress.”

“And all bonds, treasury notes, and other obligations of the United States shall be exempt from taxation by or under state or municipal authority.”

Congress further touched upon this subject of exemption from taxation of government obligations in the enactment of the Act of January 28, 1865, Chap. 22, para. 1, 13 Stat. 425, which provided that in lieu of any bonds authorized by the preceding Act that may remain unsold at the date of this Act; the Secretary of the Treasury may issue, under the authority of said Act, treasury notes of the description and character authorized by the second section of said Act. Provided that the whole amount of bonds and treasury notes shall not exceed the sum of Four Hundred Million Dollars and such treasury notes may be disposed of for lawful money, or for any other treasury notes or certificates of indebtedness, or certificates of deposit issued under any previous Act of Congress. And then provided an exemption from taxation in the following language:

“and such notes shall be exempt from taxation by or under state or municipal authority.”

The next enactment upon this subject was the Act of March 3, 1865, Chap. 77, para. 2, 13 Stat. 469, which authorized the issuance of Six Hundred Million Dollars of bonds and provided that the Secretary of the Treasury may, at his discretion, issue bonds or treasury notes authorized by this Act, in payment for any requisitions for materials or supplies which shall have been made by the appropriate department or offices upon the Treasury of the United States, on receiving notice in writing through the department or office making the requisition, that the owner of the claim for which the requisition is issued desires to subscribe for an

amount of loan that will cover said requisition, or any part thereof; and then provides an exemption from taxation in the following language:

"and all bonds or other obligations issued under this Act shall be exempt from taxation by or under state or municipal authority."

Following the termination of the war between the States Congress passed the refunding Act of July 14, 1870, Chap. 256, para. 1, 16 Stat. 272, authorizing the Secretary of the Treasury to issue Two Hundred Million Dollars of bonds redeemable in ten years; Three Hundred Million Dollars of bonds redeemable after fifteen years; and One Thousand Million Dollars of bonds redeemable after thirty years, and then provided the exemption from taxation in the following language:

"all of which said several classes of bonds and the interest thereon shall be exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under state, municipal or local authority."

This is a brief history of the legislation upon the subject of exemption from tax by state authorities of bonds, securities and other obligations of the United States. This legislation grew out of the financial necessity of the war between the States. It was probably enacted in the first great period of financial strain to the government of the United States.

A study of these various enactments discloses that the exemption clauses attached thereto were special in their nature with two exceptions. That is to say that the exemption clause in these Acts applied only to the issue of securities authorized by the Act itself.

In two of these enactments the exemption clause was general in character. In the Act of February 25, 1862, the exemption was general in character and declared "all stocks, bonds, and other securities of the United States held by individuals, corporations, or associations, within the United

States shall be exempt from taxation by or under state authority." The other exemption clause, general in character, is found in the Act of June 30, 1864, reading as follows:

"And all bonds, treasury notes, and other obligations of the United States shall be exempt from taxation by or under state or municipal authority."

A comparison of these two general exemptions discloses that Congress broadened the exemption clause in the last enactment to include other obligations. Congress had in mind that there were other obligations which should be exempt from the taxing power of the several states in order to facilitate the borrowing of money upon the credit of the United States. It must be assumed that Congress had in mind the line of authorities beginning with *McCulloch v. Maryland*, *supra*, and intended to eliminate any confusion as to the extent of exemption intended.

The state of the law remained in this condition until the first session of the 43rd Congress (1873-74) authorized a revision of the Statutes of the United States.

This Congress authorized the appointment of a commission to codify the Statutes of the United States of a general and permanent nature in force on December 1, 1873. This codification resulted in what is known as the Revised Statutes and was revised and consolidated by the commissioners appointed under the Act of Congress and reprinted with amendments under authority of an Act of Congress approved March 2, 1877.

In this edition of the Revised Statutes we find:

"Sec. 3701. All stocks, bonds, treasury notes, and other obligations of the United States, shall be exempt from taxation by or under state or municipal or local authority."

This is the reading of this section formerly known as R. S. 3701, now known as 31 U. S. C., sec. 742, except for the prefix clause which reads as follows,

"except as otherwise provided by law."

It would seem that Congress has deliberately inserted the words "other obligations", and it is under that classification that we believe the indebtedness due from the United States Government on the contract providing for the construction of the air base in question is to be classified.

The question of the application of this section of the statute was considered in *Hibernia Savings Society v. San Francisco*, 200 U. S. 310, 313 (26 S. Ct. 265, 267). In this case a taxpayer sought the exemption of certain checks or orders given by the Treasurer of the United States in payment of interest accrued on United States bonds. He sought to have these checks or orders classified as obligations of the United States and thus exempt under the section of the statute here in question. This Court in commenting upon this contention admitted the application of the statute but held that the exemption claimed, "does not apply to obligations such as checks and warrants, intended for immediate use, and designed merely to stand in the place of money until presented at the treasury, and the money actually drawn thereon. In such case the tax is virtually a tax upon the money which may be drawn immediately upon presentation of the checks."

It would seem to us that this case is an authority upon the very question that is before the Court here. The balance due under this contract certainly constitutes an obligation of the United States. It is not the equivalent of money because the contractor must have some form of payment such as check or order before he can realize upon his obligation. This case just cited seems to us to decide that if the money owed by the United States Government, that is the obligation, is not presently realizable in money or its equivalent that the obligation is one entitled to the exemption prescribed in this statute.

The language used in this case by this Court indicates that the words "other obligations" includes something other than the specific evidence of indebtedness named in the statute and that it could properly consider checks, war-

rants or orders as coming within the perview of other obligations. We believe this Court has settled the question that other obligations includes any kind of indebtedness due from the United States Government which is not presently convertible into money. In the *Hibernia* case this Court held that checks, warrants and orders came within the classification of other obligations but held them subject to tax because they were the equivalent of money. In the instant case the United States owes an obligation which is not presently convertible into money, and in that lies the distinction between the *Hibernia* case and this case. The similarity, however, in this case to the *Hibernia* case lies in the fact that the obligation of the Government is something other than "stocks, bonds and treasury notes," and in the same manner by which it was decided in the *Hibernia* case that checks or orders and warrants were other obligations of the United States and that the statute was applicable to such checks, orders and warrants, so we contend the statute and the words "other obligations" is applicable to the obligation of the United States for the balance due under this contract for the construction of an air base at Savannah, Georgia.

We therefore suggest to the Court that the balance due under this contract in question here is an obligation of the United States and comes within the protection of 31 U. S. C., sec. 742.

We believe a proper interpretation of 31 U. S. C.; sec. 742, should take into consideration the addition by way of prefix of the words "except as otherwise provided by law" to the old R. S. 3701 which was made when the United States Code was compiled. Congress had in mind that certain obligations of the United States by specific Acts were made subject to taxation. An illustration of this is found in the Act of Congress creating the Reconstruction Finance Corporation in 15 U. S. C., sec. 601, et seq., in which Act at section 610 we find that while Congress retained the exemption from taxation for "any and all notes, debts, debts,

bonds, or other such obligations issued by the corporation both as to principal and interest from all taxation" it nevertheless otherwise provided "except that any real property of the corporation shall be subject to state, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed."

We believe that a proper interpretation of the intention of Congress in the enactment of this statute as it now appears in the United States Code would result in the conclusion that all obligations of the United States not excepted by some other statute of the United States are exempt under this section. That is to say that unless there is an enactment which can be classified under "except as otherwise provided by law" that any obligation of the United States is exempt from taxation under this section of the statute. Congress certainly had this in mind in enacting the law creating the Reconstruction Finance Corporation, and in the subsequent enactment of 31 U. S. C. sec. 742a, effective March 28, 1942.

II.

If So Applicable Whether There is Constitutional Authority for the Enactment.

While the question of the constitutionality of 31 U. S. C., sec. 742, has not been directly decided by this Court, it has been assumed in a number of cases that the statute is a valid exercise of the powers of Congress. Constitution Article 1, section 8, enumerates a considerable number of powers delegated to Congress, among which are "to borrow money on the credit of the United States;" and "to raise and support armies;" and "to provide and maintain a navy." The last paragraph of section 8 provides "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the Government of the United States, or in any department or officer thereof."

These quoted portions of Article 1 of the Constitution of the United States, it would seem constitute adequate authority for sustaining the section here under consideration.

Hibernia Savings Society v. San Francisco, 200 U. S. 310 (26 S. Ct. 265)

State of Missouri ex rel. Missouri Ins. Co. v. Gehner, Assessor of City of St. Louis, et al., 281 U. S. 313 (50 S. Ct. 326)

East Helena State Bank v. Rodgers, 73 Mont. 210 (236 Pac. 1090)

Lantz v. Hanna, 111 Kan. 461 (207 Pac. 767)

In conclusion we respectfully submit to the Court that the obligation in question here comes within the purview of 31 U. S. C., see, 742, and that this section is constitutional.

Respectfully submitted,

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